FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 4 1944
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1943

No. 316

THE HECHT COMPANY, *Petitioner,*

v.

PRENTISS M. BROWN, PRICE ADMINISTRATOR OF THE OFFICE OF PRICE ADMINISTRATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR PETITIONER

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statute and Regulations Involved	2
Statement	3
Specification of Errors to be Urged	15
Summary of Argument	15
Argument	17
The Language of the Statute Permits Discretion	24
The Legislative History Indicates that Discretion Was Contemplated	28
The Construction of Other Regulatory Statutes Indicates that the Court Has Discretion	32
Decisions Under the Present Statute Support the View that the Court Has Discretion	39
Public Policy Supports Discretion	40
Conclusion	44
Appendix. Statute and Regulation Involved	I
Emergency Price Control Act of 1942	I
General Maximum Price Regulation	II

CITATIONS

Cases:

American Fruit Growers v. *United States*, 105 F. (2d) 722 (C. C. A. 9th, 1939)	23
American Mercury, Inc. v. *Chase*, 13 F. (2d) 224 (Mass. 1926)	20
Anderson's Appeal, 215 Pa. 119, 64 Atl. 443 (1906)	27
Beasley v. *People*, 89 Ill. 571 (1878)	27
Becker v. *Lebanon & M. Ry. Co.*, 188 Pa. 484, 41 Atl. 612 (1898)	25, 26
Blease v. *Safety Transit Co.*, 50 F. (2d) 852 (C. C. A. 4th, 1931)	20
Bowles v. *American Stores Inc.* (App. D. C.), decided December 13, 1943	17
Brown v. *Conner*, 1 Price Control Cases, par. 50,981 (S. D. Tex. 1943)	39
Brown v. *Douglass*, 50 F. Supp. 877 (N. D. Tex. 1943)	40
Brown v. *Dweck*, 1 Price Control Cases, par. 51,006 (S. D. N. Y. 1943)	39, 40
Brown v. *El Paso Iron & Metal Co.*, 1 Price Control Cases, par. 51,001 (W. D. Tex. 1943)	39
Brown v. *Hannum*, 50 F. Supp. 697 (W. D. Tex. 1943)	40
Brown v. *McNeil*, 1 Price Control Cases, par. 51,815 (W. D. Wis. 1943)	40
Brown v. *Mannebach*, 1 Price Control Cases, par. 50,980 (N. D. Ill. 1943)	39
Brown v. *May Hardwood Co.*, (W. D. Ky.) (unreported)	39
Brown v. *Osorio*, 1 Price Control Cases, par. 50,977 (D. P. R. 1943)	40
Brown v. *Purvin*, 1 Price Control Cases, par. 50,985 (S. D. N. Y. 1943)	40
Brown v. *Quinlan, Inc.* (N. D. Ill.) (unreported), *reversed on other grounds and remanded*, 138 F. (2d) 288 (C. C. A. 7th, 1942)	39

Page

Brown v. *Regal Typewriter Co.*, 52 F. Supp. 113 (S. D. N. Y. 1943) . . . 39
Brown v. *Russell Packing Co.*, 1 Price Control Cases, par. 50,979 (N. D. Ill. 1943) . . . 39
Brown v. *Society Brand Hat Co.*, 1 Price Control Cases, par. 50,965 (E. D. Mo. 1943) . . . 40
Brown v. *Southwest Hotels, Inc.*, 50 F. Supp. 147 (E. D. Ark. 1943) . . . 39
Brown v. *Standard Oil Co. of Ky.*, 1 Price Control Cases, par. 50,991 (N. D. Ala. 1943) . . . 40
Butterick Co. v. *Federal Trade Commission*, 4 F. (2d) 910 (C. C. A. 2d, 1925) . . . 37
Clancy v. *McElroy*, 30 Wash. 567, 70 Pac. 1095 (1902) . . . 25
Clover Farm Stores Corp., 32 F. T. C. D. 1635 (1941) . . . 37
In re Davies, 168 N. Y. 89, 61 N. E. 118 (1901) . . . 27, 42
Decatur Iron & Steel Co., 17 N. L. R. B. 1073 (1939) . . . 36
Exchange Bakery & Restaurant, Inc. v. *Rifkin*, 245 N. Y. 260, 157 N. E. 130 (1927) . . . 20
Federal Trade Commission v. *Civil Service Training Bureau*, 79 F. (2d) 113 (C. C. A. 6th, 1935) . . . 37
Federal Trade Commission v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257 (1938) . . . 23
Fels & Co., 34 F. T. C. D. 1536 (1942) . . . 37
Ferguson Bros. Manufacturing Co., 9 N. L. R. B. 189 (1938) . . . 37
Fleming v. *Hoerman*, 6 Labor Cases, par. 61,283 (Kans. 1942) . . . 33
Fleming v. *Kull*, 4 Wage Hour Reporter 411 (E. D. Tex. 1941) . . . 33
Fleming v. *Lincoln Looseleaf Warehouse Co.*, 5 Wage Hour Reporter 615 (E. D. Tenn. 1942) . . . 33
Fleming v. *National Bank of Commerce*, 41 F. Supp, 833 (S. D. W. Va. 1941) . . . 20, 33
Fleming v. *Phipps*, 35 F. Supp. 627 (Md. 1940) . . . 19, 33
Frichofer Baking Co., 25 F. T. C. D. 1505 (1937) . . . 37
Gloray Knitting Mills, 19 N. L. R. B. 712 (1940) . . . 36
Godchaux Sugars, Inc., 12 N. L. R. B. 568 (1939) . . . 36
Golding Bros. Co., Inc., 33 F. T. C. D. 1631 (1941) . . . 37
Henderson v. *Baldwin*, 1 Price Control Cases, par. 51,711 (W. D. Pa. 1942) . . . 40
Henderson v. *Burd*, 133 F. (2d) 515 (C. C. A. 2d, 1943) . . . 23
Henderson v. *Sonken-Galamba Corporation*, 1 Price Control Cases, par. 50,901 (W. D. Mo. 1942) . . . 39
Henderson v. *C. Thomas Stores, Inc.*, 48 F. Supp. 295 (Minn. 1942) . . . 40
Hope Webbing Co., 14 N. L. R. B. 55 (1939) . . . 36
Jenkins v. *Putnam*, 106 N. Y. 272, 12 N. E. 613 (1887) . . . 27
International Agricultural Corp., 16 N. L. R. B. 176 (1939) . . . 36
In re Laub, 21 A. (2d) 575 (Pa. Super. 1941) . . . 27
M. J. Levinson, d. b. a. Lewis, Francine Laboratories Co., 25 F. T. C. D. 1499 (1937) . . . 37
Longshore Printing & Pub. Co. v. *Howell*, 26 Ore. 527, 38 Pac. 547 (1894) . . . 20
Meade v. *Meade*, 111 Va. 451, 69 S. E. 330 (1910) . . . 27
Meredith v. *City of Winter Haven* (No. 42, Oct. Term, 1943) . . . 42
Munro v. *State*, 223 N. Y. 208, 119 N. E. 444 (1918) . . . 27
Nann v. *Raimist*, 255 N. Y. 307, 174 N. E. 690 (1931) . . . 20
National Labor Relations Board v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261 (1938) . . . 37
Parkinson Co. v. *Building Trades Council*, 154 Cal. 581, 98 Pac. 1027 (1908) . . . 20
Parkison v. *Thompson*, 164 Ind. 609, 73 N. E. 109 (1905) . . . 27, 43
People v. *Nussbaum*, 32 Misc. 1, 66 N. Y. Supp. 129 (1900) . . . 27
Pittsburgh v. *Coursin*, 74 Pa. 400 (1873) . . . 27
Reed v. *Wellman*, 110 Neb. 166, 193 N. W. 261 (1923) . . . 27
In re Rutledge, 162 N. Y. 31, 56 N. E. 511 (1900) . . . 25
Sanford Hosiery Mills, 25 F. T. C. D. 1506 (1937) . . . 37

Page

Securities and Exchange Commission v. *Jones*, 85 F. (2d) 17 (C. C. A. 2d, 1936), *cert. denied* 219 U. S. 581 23
Securities & Exchange Commission v. *Lawson*, 24 F. Supp. 360 (Md. 1938) 28
Shenandoah-Dives Mining Co., 11 N. L. R. B. 885 (1939) 36
Shore v. *United States*, 282 Fed. 857 (C. C. A. 7th, 1922) 20
L. B. Silver Co. v. *Federal Trade Commission*, 292 Fed. 752 (C. C. A. 6th, 1923) 37
Carl Smith, d. b. a. Fashion Silk Co., 25 F. T. C. D. 1503 (1937) 37
State v. *District Court*, 106 Mont. 272, 76 P. (2d) 634 (1938) 25
State v. *Strait*, 94 Minn. 384, 102 N. W. 913 (1905) 27
State ex rel. Nixon v. *Grace*, 98 Ark. 505, 136 S. W. 670 (1911) 27
Stromberg-Carlson Telephone Mfg. Co., 18 N. L. R. B. 526 (1939) 36
Swift & Co. v. *United States*, 276 U. S. 311 (1928) 20
Talledega Cotton Factory, 9 N. L. R. B. 207 (1938) 36
The Texas Co., 25 F. T. C. D. 1509 (1937) 37
United States v. *Adler's Creamery*, 110 F. (2d) 482 (C. C. A. 2d, 1940), *cert. denied*, 311 U. S. 657 23
Walling v. *T. Buettner & Co.*, 133 F. (2d) 306 (C. C. A. 7th, 1943), *cert. denied*, 319 U. S. 771 ..... 20, 28, 32
Walling v. *Builders' Veneer and Woodwork Co.*, 45 F. Supp. 808 (E. D. Wis. 1942) 20
Walling v. *Shenandoah-Dives Mining Co.*, 134 F. (2d) 395 (C. C. A. 10th, 1943) 19
Walling v. *Woodruff*, 49 F. Supp. 52 (M. D. Ga. 1942) 33
Appeal of Wentz, 76 Conn. 405, 56 Atl. 625 (1904) 27
Wickwire Bros., 16 N. L. R. B. 316 (1939) 36
A. H. Wirz, Inc., 9 N. L. R. B. 480 (1938) 36

Statutes and Regulations:

Agricultural Adjustment Act of 1933 (Act of May 9, 1933, c. 263, 48 Stat. 672, 7 U. S. C. Sec. 608(a)(6)) 34
Agricultural Associations Act (Act of February 18, 1922, c. 57, 42 Stat. 388, 7 U. S. C. Sec. 292) 34
Alteration of Bridges Act (Act of June 21, 1940, c. 409, 54 Stat. 500, 33 U. S. C. Sec. 519) 35
Civil Aeronautics Act (Act of June 23, 1938, c. 601, 52 Stat. 1025, 49 U. S. C. Sec. 647(a)) 35
Clayton Act (Act of Oct. 15, 1914, c. 323, 38 Stat. 734, 15 U. S. C. Sec. 21) 31
Emergency Price Control Act of 1942 (Act of January 30, 1942, 56 Stat. 23, 50 U. S. C. A. App. Sec. 901) ..... *passim*
Fair Labor Standards Act (Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C. Sec. 217) 19, 32
Farmers' Cooperative Associations Act (Act of March 4, 1937, c. 508, 44 Stat. 1424, 15 U. S. C. Sec. 433) 34
Federal Alcohol Administration Act (Act of August 29, 1935, c. 814, 49 Stat. 985, 27 U. S. C. Sec. 207) 34
Federal Food, Drug and Cosmetic Act (Act of June 23, 1938, c. 675, 52 Stat. 1043, 21 U. S. C. Sec. 332(a)) 35
Federal Power Acts (Act of June 10, 1920, c. 285, 41 Stat. 1076, 16 U. S. C. Sec. 820 and Act of August 26, 1935 as amended, c. 687, 49 Stat. 861, 16 U. S. C. Sec. 825m(a)) 34
Federal Trade Commission Act (Act of Sept. 26, 1914, c. 311, 38 Stat. 719, 15 U. S. C. Sec. 45) 31, 37
General Maximum Price Regulation, 7 Fed. Reg. 3153 ..... *passim*
Hot Oil Act (Act of February 22, 1935, c. 18, 49 Stat. 33, 15 U. S. C. Sec. 715i(a) 34

Page

Interstate Commerce Act, Part III—Water Carriers (Act of September 18, 1940, c. 722, 54 Stat. 946, 49 U. S. C. Sec. 916(b) and Part IV—Freight Forwarders (Act of May 16, 1942, c. 318, 56 Stat. 297, 49 U. S. C. Sec. 1017(b)) 35
Investment Acts of 1940 (Act of Aug. 22, 1940, c. 686, 54 Stat. 842, 853, 15 U. S. C. Secs. 80a-41, 80b-9) 31
National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 453, 29 U. S. C. Sec. 160(c)) ..... 31, 35 et seq., 43
Natural Gas Act (Act of June 21, 1938, c. 556, 52 Stat. 833, 15 U. S. C. Sec. 717u) 35
Public Utility Holding Company Act of 1935 (Act of August 26, 1935, c. 687, 49 Stat. 831, 15 U. S. C. Sec. 79r(f)) 34
Securities Act of 1933 (Act of May 27, 1933, c. 38, 48 Stat. 86, 15 U. S. C. Sec. 77t(b)) 34
Securities Exchange Act of 1934 (Act of June 6, 1934, c. 404, 48 Stat. 882, 15 U. S. C. Sec. 78aa) 34
Sherman Act (Act of June 2, 1890, c. 647, 26 Stat. 209, 15 U. S. C. Sec. 4) 34
Sugar Act of 1937 (Act of September 1, 1937, c. 898, 50 Stat. 915, 7 U. S. C. Sec. 1175) 34

Articles, Texts and Other Authorities:

Annual Report of The Federal Trade Commission (1942) 37
Crawford, *Statutory Construction* (1940) Sec. 267 25
House Report No. 2639, 76th Congress, 3rd Session 35
House Report No. 1409, 77th Congress, 2nd Session 32
Joyce, *Injunction* (1909) Sec. 41 20
Senate Report No. 1775, 76th Congress, 3rd Session 35
Senate Report No. 931, 77th Congress, 2nd Session 28, 29
Sutherland, *Statutory Construction* (3d ed. 1943) Sec. 5810 25

Supreme Court of the United States

OCTOBER TERM, 1943

No. 316

THE HECHT COMPANY, *Petitioner,*

v.

PRENTISS M. BROWN, PRICE ADMINISTRATOR OF THE OFFICE OF PRICE ADMINISTRATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR PETITIONER

OPINIONS BELOW

The findings of fact, conclusions of law, and memorandum opinion of the District Court (R. 441-454) are reported in 49 F. Supp. 528. The opinions of the Court of Appeals for the District of Columbia (R. 593-610) are reported in 137 F. (2d) 689.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered July 22, 1943 (R. 610-611). The petition for a writ of certiorari was filed on September 2, 1943, and the writ was granted on Octo-

ber 18, 1943. The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code, as amended by the Act of February 23, 1925.

QUESTION PRESENTED

Whether, despite findings, *inter alia*, that "the defendant and its employees have attempted in good faith to comply with the [Emergency Price Control] Act, and have taken vigorous steps to do so"; that "the compliance thus resulting has been very substantial"; that "there were no wilful violations"; that "mistakes have been corrected as soon as discovered, and vigorous steps have been taken against their happening again"; that "these acts have all been done voluntarily and at considerable expense, in a spirit of full cooperation with the Office of Price Administration and with its aims and policies"; that "the defendant has improved its system of control so that the indication is that there will be no further violations except such as may be caused by human frailties"; that "no one has suggested to the defendant how its present method of compliance can be made better"; and that "an injunction would have no effect by way of insuring better compliance in the future", "would be unjust to the defendant", and "would not be in the public interest", nevertheless Section 205(a) of the Act requires that upon a finding of a violation of the Act or a regulation issued thereunder the court is deprived of all discretion and must issue an injunction as a matter of course without regard to any equitable considerations.

STATUTE AND REGULATIONS INVOLVED

The relevant portions of the Emergency Price Control Act of 1942 (Act of January 30, 1942, c. 26, 56 Stat. 23, 50 U. S. C. A. App. Sec. 901) and the General

Maximum Price Regulation (7 Fed. Reg. 3153, April 30, 1942), are set out in the Appendix.

STATEMENT

This is a proceeding by which the Price Administration seeks an injunction against The Hecht Company, a Washington, D. C., department store, to restrain it from violating the General Maximum Price Regulation (7 Fed. Reg. 3153) promulgated under the Emergency Price Control Act of 1942 (56 Stat. 23). Upon the filing of the complaint on December 8, 1942 (R. 1) a temporary restraining order was entered *ex parte* (R. 6-7). By agreement the case was then advanced and tried on the merits (R. 9-10). After the trial, the District Court dismissed the complaint and dissolved the temporary restraining order (R. 455). Its findings of fact and conclusions of law (R. 447-454) present a rather complete picture of the case as found by the court after a trial of several weeks, and are therefore set out in full, as follows.[1]

1. Leon Henderson, the original plaintiff, was the Price Administrator. During the progress of the trial he resigned, and Prentiss M. Brown, his successor in that office, was substituted as plaintiff.

2. Defendant corporation operates a large department store in Washington, D. C. The store enjoys an excellent reputation, and its business has grown from a volume of about $500,000 in 1894 to about $20,000,000 in 1942 (R. 427).

3. The Emergency Price Control Act was approved January 30, 1942, and, prior to the promulgation of the

[1] The Record references are included to some of the supporting testimony.

General Maximum Price Regulation, the application of which is involved in these proceedings. The Hecht Company had already taken steps to prepare itself for compliance with whatever price control regulations might be issued (R. 76, 122-123). One of its executives had gone to Canada to study and report on the Canadian system of price control (R. 428). The Hecht Company had created a new section known as the Price Control Office with office space set aside within the store which was to be devoted entirely to price control (R. 122-123). This was headed by Mr. Robert Levi, a well educated and well trained employee who had a wide knowledge of the operation of the store (R. 75-76, 427-428). Mr. Levi was told to employ such persons as were necessary and was given an unlimited budget (R. 80, 429, 433-434). He organized his section and assumed the direction of compliance with certain price regulations relating to nylon hose, household mechanical refrigerators, and household vacuum cleaners which had been put in effect prior to the promulgation of the General Maximum Price Control Regulation (R. 76).

4. Prior to the promulgation of the General Maximum Price Control Regulation, The Hecht Company had also made evident its desire to cooperate with the Office of Price Administration (R. 78, 135, 430). Its store was made available to members of the staff of the Office of Price Administration on numerous occasions, and Mr. Dulcan, the general manager, proffered the store and its personnel as a testing or proving ground or laboratory, in which the Office of Price Administration might check or experiment with any regulation which might be issued (R. 134-135, 429-430). The Hecht Company staff prepared drawings which were used as illustrations in a bulletin later issued by the Office of Price Administration (R. 420-422).

5. General Maximum Price Regulation, promulgated by the Price Administrator, was dated April 28, 1942, was published in the Federal Register April 30, 1942, and was to become effective as to manufacturers on May 11, and as to retailers on May 18, 1942. It provided that a seller's maximum price for any commodity should be, in those cases in which the seller dealt in the same or similar commodities during March 1942, the highest price charged by the seller during March 1942 for the same commodity, or if no charge was made for the same commodity, for the similar commodity most nearly like it, and in those cases in which the seller did not deal in the same or similar commodities during March 1942 the highest price charged during that month by the most closely competitive seller of the same class for the same commodity, or if no charge was made for the same commodity for the similar commodity most nearly like it. It was provided that for the purpose of the regulation the highest price charged by a seller during March 1942 should be the highest price which the seller charged for a commodity delivered by him during March 1942, or if the seller made no such delivery during March 1942, his highest offering price for delivery during that month. It was provided that in cases where the same or similar commodities had not been sold by the seller or by his competitors the seller's maximum price should be determined by the seller selecting from the same general classification and price range as the commodity being priced the comparable commodity for which the seller could establish a price and of which the seller delivered the largest number of units during March 1942, that the seller should divide his maximum price for that commodity by his replacement cost of that commodity, and should multiply the percentage so obtained by the cost to him of

the commodity being priced, and that the resulting figure should be the maximum price of the commodity being priced. The regulation also provided that a seller should preserve existing records relating to prices for commodities delivered during March 1942, and offering prices during that month; that he should prepare prior to July 1, 1942, and thereafter keep for examination, a statement showing the highest prices charged for commodities delivered during March 1942 and offering prices for delivery during that month together with an appropriate description or identification of each such commodity; and that he should keep records relating to the prices charged for commodities sold after the effective date of the regulations and records showing the basis on which he determined maximum prices for those commodities. The regulation also provided that in the case of certain commodities designated as cost-of-living commodities and listed in an appendix to the regulation every seller should on and after May 18, 1942, mark the maximum price of such commodity on the commodity or post such price in the store, and that lists of such commodities with the maximum selling price and with appropriate descriptions should be filed in the Office of Price Administration on or before June 1, 1942,[2] and thereafter kept up to date by monthly supplements (7 Fed. Reg. 3153).

6. Mr. Levi secured an advance copy of General Maximum Price Regulation, several days before it was formally published, and immediately mapped out and put in effect a series of moves to bring The Hecht Company into compliance (R. 80-82). This work had to be done rapidly because of the limited period of time

[2] By a bulletin issued May 22, 1942, this date was extended to July 1, 1942 (R. 95, 107).

after April 28, 1942, the date of the promulgation of the General Maximum Price Regulation and before May 18, 1942, the date on which the maximum prices were to become effective and the posting made (R. 95, 98), and before June 1, 1942, when the list of cost-of-living commodities was to be filed (R. 95, 106-107). The Washington store of The Hecht Company contained 107 selling departments, each of which was in effect a small store (R. 433). The head of each department was called a "buyer", some of whom had charge of more than one department (R. 77-78, 432-433). It was the duty of the buyer to order the goods for his department, to price them, to sell them, and generally to manage the department (R. 77-78, 432-433). The primary responsibility for compliance with the various aspects of the regulations was placed on the buyers in the various departments (R. 18-19, 98-99, 124, 145, 432). This was the only course that could have been followed, since only the buyers were sufficiently well acquainted with the stock and the operation of their departments to be able to determine what deliveries had been made in March 1942, and at what prices, and to compare the articles on hand with the articles delivered in March (R. 98-99, 145-146). To insure that the buyers accepted and fulfilled the responsibility thus imposed upon them, Mr. Levi interpreted the regulations and applied them to the particular problems of the store, prepared and distributed memoranda and forms (R. 18-19, 82, 85-91, 96-101, 103-105, 107-111, 113-114, 136-137, 139, 150-154), conducted frequent meetings of the buyers (R. 78-79, 81, 92-94, 103, 135, 144-146, 155-156, 430), answered questions (R. 93, 96-97), and in general made the buyers aware of what had to be done to comply with the regulations and kept track of their performance (R. 116-117). Mr. Levi devoted all of his time to this work

and he had seven assistants who devoted all of their time to it (R. 97). He kept closely in touch with developments at the Office of Price Administration (R. 168, 149-150, 154-155), and subscribed to a number of services which kept him informed of new regulations and interpretations (R. 79). About June 20, 1942, Mr. Levi resigned to become an Ensign in the United States Coast Guard (R. 75, 122), and his place was taken by Mr. Etelson (R. 17, 19), who had been with the store for many years (R. 133, 433) and was well qualified to carry on the work (R. 132-134, 433). Mr. Etelson had been prepared for the post by Mr. Levi for about a month before Mr. Levi left the store (R. 135-136). From the time he replaced Mr. Levi, Mr. Etelson continued the program of educating and supervising the staff of The Hecht Company in order to insure compliance with the regulations of the Office of Price Administration (R. 136-137, 144-157).

7. Notwithstanding the work of Mr. Levi and Mr. Etelson the buyers made mistakes (R. 158, 160). The Washington store of The Hecht Company has approximately two thousand employees (R. 425). Its inventory of January 30, 1942, showed in excess of one million two hundred thousand items of merchandise (R. 401); it had between January 1, 1942, and November 1, 1942, some fifty-four thousand and thirty transactions in the furniture departments alone (R. 336). A transaction includes any number of items bought by a customer at the time of the transaction. The application of the regulations to the pricing of a particular article often involved interpretation of the regulations as well as exact knowledge of the nature of the article, whether the same or similar articles had been delivered in March 1942, etc. (R. 106-107, 110-113, 131-132, 134-135). The buyers were merchants who were not trained

in such interpretation (R. 77, 124, 432). The correct pricing of the articles was made difficult by the novelty of the regulations (R. 78, 134-135), by the large volume of articles (R. 401), by the fact that the comparisons were with deliveries two months before as to which it was often hard to find adequate records (R. 249-251). The buyers were further confused, and the work of Mr. Levi and Mr. Etelson and the Price Control Office of the store was made much more difficult, by the fact that there were numerous other regulations of the Office of Price Administration (R. 99-103, 108, 116, 125-126, 136, 148-152, 192-193), many of which in whole or in part were applicable to the store (R. 100), and which were all different from General Maximum Price Regulation (R. 100-101, 108-110), and many of which differed from each other in their method of determining prices (R. 103, 136-140, 150-152), including regulations relating to summer seasonal commodities, women's, girls' and children's outwear garments, men's and boys' tailored clothing, women's fur garments, fall and winter seasonal commodities, bed springs, waterproof rubber footwear, stirrup pumps, phonograph records, paper products, corded yarn garments, and women's silk hosiery (R. 99-100, 114-116), and in addition were numerous amendments issued from time to time by the Office of Price Administration of not only the General Maximum Price Regulation but also of the other maximum Price Regulations (R. 139-142). Mistakes in pricing were caused by difficulties and delays in determining what articles had been delivered in March and at what prices (R. 196-197, 236-237, 243-246, 287-289), occasionally errors would be made because of human mistakes in listing, typing or copying (R. 143, 175-178, 203, 234, 240-241, 249, 252, 256, 259, 294-295), and in some instances the buyers permitted articles to be sold

before the proper price had been established for them (R. 287-289). In a few instances buyers erroneously believed the prices could be equalized so that items of the same value would not be sold at different prices (R. 162, 178, 186-187, 216-219). Mistakes were made in listing owing to the fact that some of the buyers misinterpreted the requirement for listing all items sold or delivered for sale in March, and listed only a representative selection of goods showing each price range, style and cost, but not each source or style number, and the same misunderstanding caused the omission of items newly received which were similar to items already listed (R. 158-159, 181, 215). In one department a buyer, whose listing was otherwise quite complete, erroneously believed that slippers, play shoes, and rubbers were not cost-of-living commodities and that they did not have to be listed (R. 203, 205, 209). These mistakes in pricing and listing were all made in good faith and without intent to violate the regulations (R. 141-142, 190-191). The performance of the store as to posting was excellent (R. 117-121, 224-228, 404-420).

8. In the latter part of September 1942, the Office of Price Administration commenced an investigation which continued for approximately six weeks and in which ten people took part from time to time (R. 17, 20, 74-75). The Hecht Company gave the investigators every possible help, and made available for assistance to the investigators its own personnel, including Mr. Etelson, the Price Control Administrator of the store, and the buyers in the departments which were under investigation (R. 18, 137, 181, 434, 437-438). The services of such people were quite largely utilized by the investigators. The investigation disclosed that buyers had made the mistakes set forth in the preceding paragraph. The complexity of the subject caused the in-

vestigators sent by the Office of Price Administration also to make numerous mistakes in their report (R. 157, 160, 173-174, 176, 178-179, 207, 250, 290, 301-303).

9. The mistakes brought to light by the investigation were at once corrected (R. 142-144, 182-183, 187, 190, 203, 214-215), and vigorous steps were taken by The Hecht Company to prevent recurrence of these mistakes or further mistakes in the future (R. 282 ff., 377-378, 437). Mr. Etelson's staff was increased several times (R. 143, 156, 286, 434), until it reached the number of twenty-eight employees who were engaged under his direction in seeing that the store complied with the regulations as to price control (R. 156-157, 286, 424-425). New methods of control were instituted so that by early November 1942 the system was as follows (R. 230-235, 282 ff.): Copies of all orders for articles go to the store's price control office. If it is a re-order of an article already registered at the price control office the buyer must put on the copy in green ink the page and line number at which the article is registered in the ceiling price book. If the order is for a new article the order must have attached to it a form supplied by the store which indicates the basis of the comparison in accordance with the procedure outlined in paragraph 5, *supra*, or the method of establishing the ceiling price for the new item if it is covered by a regulation other than the General Maximum Price Regulation. The price control office checks the form to see that it is properly filled out, that the article upon which the comparison is based is listed, and at the price as indicated on the form, and that the comparison appears to be a proper one. Where goods are ordered to be sold in the future and the price cannot be established at once the form is left blank, and a statement is attached that the goods must not be brought from the warehouse to the

store until the buyer has been notified and a ceiling price established. After a copy of the order has gone through the price control office it goes to the invoice office to be held until the merchandise arrives. It is then matched against the merchandise, and the invoice office puts on the invoice in red ink the retail price and in green ink the ceiling price and then sends the form back to the price control office, thus showing that the goods have arrived and have been priced. The invoice then goes to the markers, who make up the price tickets and put on them the retail and ceiling prices. The price tickets are then affixed to the items. No article can go on the floor of the store until all this has been done. Moreover, although the regulations provide that the ceiling price need be stated only on cost-of-living commodities the store is now putting the ceiling price on every article that comes in. The payroll of the price control office for the week ending December 19, 1942; had reached the sum of $853.00 for employees who devoted all their time to that work. Taking the proportion of the time of other employees which was devoted to this work the additional sum of $1,267.50 was expended at that time weekly by The Hecht Company in complying with the regulations (D. Ex. 78; R. 424 et seq.).

10. It has always been the policy of The Hecht Company to give a customer credit for any overcharge which may have been discovered by the store, and The Hecht Company is making repayment of all overcharges brought to light by the investigation in case of customers who can be identified. The Company proposes to contribute to some local charity the amount of any such overcharges which cannot thus be allocated (R. 437).

11. December 8, 1942, Leon Henderson who was then the Price Administrator instituted this suit, asking that

this defendant be enjoined from violating the General Maximum Price Regulation or any regulation adopted pursuant to the provisions of the statute establishing maximum prices or requiring the making or keeping of records or the making of reports. The defendant received no warning before the institution of the suit (R. 122-123, 437). There has never been any refusal by the store or any of its employees to comply with any orders or requests of the Office of Price Administration (R. 122-123, 434 et seq.).

12. The defendant and its employees have attempted, in good faith, to comply with the act, and have taken vigorous steps to do so (R. 155-157). The compliance thus resulting has been very substantial (R. 157). Violations have occurred, but they have not been numerous in view of the difficulties involved in the defendant's efforts to comply. There were no wilful violations. Mistakes have been corrected as soon as discovered (R. 142-144), and vigorous steps have been taken to insure against their happening again (R. 153-154, 230-235), and to combat the difficulties which arise from human frailty. These acts have all been done voluntarily and at considerable expense (R. 422 et seq.), in a spirit of full cooperation with the Office of Price Administration and with its aims and policies (R. 117, 144, 431-434). The defendant's system of control has been greatly improved (R. 230-235, 282 ff.), and no one has suggested to the defendant how its present method of compliance can be made better (R. 122-123, 234). An injunction would have no effect by way of insuring better compliance in the future, and would be unjust to the defendant. An injunction would not be in public interest.

Based on the foregoing findings, the court entered conclusions as follows (R. 454):

1. Section 205(a) of the Emergency Price Control Act of 1942 does not require this Court automatically to issue an injunction in any case where violations of the statute are shown or admitted.

2. The purpose of an injunction is to deter rather than to punish, and an injunction should not issue unless thereby better compliance with the law may be enforced. Each case must be measured and decided according to its own circumstances, and the Court may exercise its discretion in accordance with the equities of the case.

3. The complexity of the regulations and the difficulty of compliance are not in themselves defenses in this case, but may be considered in connection with other evidence bearing on the extent of the defendant's efforts to comply.

4. Where the defendant has made a determined effort to comply with the regulations issued under the Emergency Price Control Act of 1942, and where violations were the result of errors on the part of employees of the defendant made in good faith, and where the attitude of the defendant is not antagonistic, but is cooperative, and where the defendant has improved its system of control so that the indication is that there will be no further violations except such as may be caused by human frailties, an injunction would be unjust to the defendant and would not be in the public interest and this court should decline to issue an injunction.

On appeal by the Price Administrator, the Court of Appeals for the District of Columbia, by a divided Court, reversed the decision of the District Court (R. 610-611). The Court felt compelled to reverse on the

theory that under Section 205(a) "an injunction or other order is to be granted as of course when violations of the Act are found" (R. 598).

On August 11, 1943, the Court below stayed its mandate pending a determination by this Court, provided that the petition for certiorari should be filed by September 2, 1943. This was done, and the mandate has not issued.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the District of Columbia erred:

(1) In holding that Section 205(a) of the Act removed all discretion from the District Court and made it mandatory that an injunction be granted when a violation of the Act is found.

(2) In holding that the District Court was required to issue an injunction against petitioner upon the facts found in this case.

(3) In reversing the judgment and order of the District Court.

SUMMARY OF ARGUMENT

Section 205(a) of the Emergency Price Control Act does not force a federal equity court to issue an injunction whenever it finds a violation of the Act or the regulations issued under it. On the contrary, under that section, courts of equity remain courts of equity, with discretion to act in each case as the equities require, and injunctions remain injunctions, and are not issued as penalties.

Heretofore it has been axiomatic that injunctions were issued to deter, not to punish. Neither the language nor the legislative history of Section 205(a) war-

rants the conclusion of the majority below that Congress has jettisoned all prior doctrine by its enactment. So far as language is concerned, the statute expressly contemplates such "other order"—apart from a permanent or temporary injunctive or a restraining order—as the equities of the case may require. Moreover, the use of the words "shall issue", upon which the Administrator strongly relies, do not warrant his conclusion; where the legislative direction is addressed to a court or judge, the word "shall" does not ordinarily have a mandatory connotation.

Our interpretation is fully borne out by the legislative history of Section 205(a). The Senate Committee, in reporting it, stated that it was "in common with substantially all regulatory statutes", and unquestionably substantially all such statutes recognize that the courts will act in each case as the equities require. Other statutes which use the word "shall", and upon which the Administrator relies, also indicate a consistent construction in accord with the view which we urge. The decisions under Section 205(a) itself are almost uniformly in accord with our position.

The Administrator's argument that public policy supports his construction because it aids in enforcement of the Act is demonstrably unsound: Congress has provided an arsenal of sanctions which the Administrator may apply whenever sanctions are necessary. Congress has not, however, indicated any intention to apply sanctions when they are unnecessary, as in the present case. Nor has Congress indicated that it intended to raise the serious questions of law and policy which are involved in a construction of Section 205(a) which coerces judicial action and destroys, *pro tanto*, the independence of the judicial branch.

ARGUMENT

The issue in this case is the proper interpretation of one of the sections of the enforcement provisions of the Emergency Price Control Act of 1942 (56 Stat. 23). Section 205 of that Act provides three types of actions by which the aid of the courts may be enlisted in enforcing its requirements. First, under Section 205(e), a buyer of goods sold in violation of the Act may bring an action at law for $50, or for treble damages, whichever is greater, plus attorney's fees. Second, under Section 205(a) the Administrator may apply for an injunction to restrain violations. Finally, under Section 205(b), the Government may bring criminal proceedings against wilful violators.[3]

The enforcement provisions of Section 205 thus cover both extremes of enforcement machinery and also a middle ground. A judgment at law for civil damages may be obtained by simply showing that a sale in violation of the statute or regulation has occurred.[4] At the other extreme, a criminal conviction may be obtained only where a *wilful* violation of the statute or regulation is shown. It is our position that the statutory proceeding for an injunction under Section 205(a), which must be brought in a court of equity, occupies a middle ground, where the court is left with discretion to consider the equities of the particular case and to enter the decree that seems proper in all the circumstances.

Section 205(a), which deals with injunction suits such as the one at bar, provides as follows:

---

[3] Section 205 also provides, in paragraph (f), for an administrative enforcement machinery through the medium of licenses.

[4] *Bowles* v. *American Stores Inc.* (App. D. C.), decided December 13, 1943.

> Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such a person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

Counsel for the Administrator, and the majority of the court below, give this section an extreme construction. As they read the section, a District Court is *forced* to issue an injunction whenever it finds any violation, either of the statute or of any of the multifarious regulations issued under it. They construe the section not as an injunctive measure, but as a punitive one. As they read it, no regard need be had to the probability or lack of probability of *future* harm to the public interest; regard need be had only to the *past*—has there been any violation at any time of the statute or any of the regulations. The language of the majority opinion makes this clear (R. 598):

> The phrase "a permanent or temporary injunction, restraining order, or other order shall be granted", in its context, means in our opinion that an injunction or other order is to be granted as of course when violations of the Act are found.

Manifestly, federal equity courts by that interpretation are shorn of every vestige of discretion or equitable power under this Act. Their function becomes no more and no less than that of criminal courts: to

determine whether a violation has occurred—except that the accused has no right of trial by jury. By that interpretation, the injunctions which the courts are to issue lose their character as preventive measures and become simply penalties.

We believe, on the contrary, that Congress contemplated no such result. When Section 205(a) is read in the light of its legislative history it is apparent that Congress had no intention of coercing action by federal equity courts, nor of perverting injunctions into a form of punishment. In our view, in the view of the District Court, and in the view of the dissenting justice below, the courts of equity remain courts of equity, with discretion to act in each case as the equities require; injunctions, by the same token, remain injunctions, and are issued not as penalties, but to insure better compliance with the law in the future.

Heretofore (at least until the decision of the court below) it has been an axiom of equity, in both federal and state courts, and in both public and private litigation, that injunctions were framed and issued in terms of the court's judgment of the necessities of the *future*. No one, heretofore, would have taken issue with the statement of the court, in passing upon a cognate question under the Fair Labor Standards Act,[5] in *Fleming v. Phipps*, 35 F. Supp. 627 (Md. 1940): "It would seem to be elementary that the purpose of an injunction is to deter rather than to punish." A similar situation prompted an equally vigorous comment in *Walling v. Shenandoah-Dives Mining Co.*, 134 F. (2d) 395, 397 (C. C. A. 10th, 1943):

> An injunction may not be employed to punish past violations or to simply establish that viola-

[5] Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C. Sec. 217.

> tions had occurred. Its function is to stop existing violations or prevent further infractions if there is any reason to believe that they may occur.

Again, the Seventh Circuit has stated in *Walling* v. *T. Buettner & Co.*, 133 F. (2d) 306 (1943), *certiorari denied*, 319 U. S. 771:

> A court of equity will not afford an injunction to prevent in the future that which in good faith has been discontinued before the suit for injunction was brought, and where there is no evidence that the offense is likely to be repeated in the future. * * * Employers who are acting in good faith and endeavoring to comply with the law should not be harassed by the processes of a court of equity coercing them to do what they are willing to do and are trying to do voluntarily.

There are many decisions to the same effect in both the federal and state courts. See, *e.g.*, *Swift & Co.* v. *United States*, 276 U. S. 311, 326 (1928); *Shore* v. *United States*, 282 Fed. 857, 859 (C. C. A. 7th, 1922); *Blease* v. *Safety Transit Co.*, 50 F. (2d) 852, 856 (C. C. A. 4th, 1931); *American Mercury, Inc.* v. *Chase*, 13 F. (2d) 224, 225 (Mass. 1926); *Fleming* v. *National Bank of Commerce*, 41 F. Supp. 833 (S. D. W. Va. 1941); *Walling* v. *Builders' Veneer and Woodwork Co.*, 45 F. Supp. 808 (E. D. Wis. 1942); *Nann* v. *Raimist*, 255 N. Y. 307, 174 N. E. 690, 694 (1931); *Exchange Bakery & Restaurant, Inc.* v. *Rifkin*, 245 N. Y. 260, 157 N. E. 130 (1927); *Longshore Printing & Pub. Co.* v. *Howell*, 26 Ore. 527, 38 Pac. 547 (1894); *Parkinson Co.* v. *Building Trades Council*, 154 Cal. 581, 98 Pac. 1027 (1908); Joyce, *Injunctions* (1909) Sec. 41.

Counsel for the Administrator contend, and the court below has held, that by Section 205(a) of the Emergency Price Control Act, *supra*, all of the prior doc-

trine of *preventing* by injunction is jettisoned, and a radically different course of *punishing* by injunctions is substituted. On any principle of statutory construction, only the most clearcut and explicit language can compel that result. We believe that, upon examination, it will be apparent that Congress neither intended nor compelled any such result. We believe Congress plainly intended that the equity court might, as it did here, refuse an injunction when it found that (R. 447-454):

> the defendant and its employees have attempted, in good faith, to comply with the act, and have taken vigorous steps to do so;
>
> there were no wilful violations;
>
> mistakes have been corrected as soon as discovered, and vigorous steps have been taken to insure against their happening again, and to combat the difficulties which arise from human frailty;
>
> these acts have all been done voluntarily and at considerable expense, in a spirit of full cooperation with the Office of Price Administration and with its aims and policies;
>
> no one has suggested to the defendant how its present method of compliance can be made better;
>
> *an injunction would have no effect by way of insuring better compliance in the future and would be unjust to the defendant; and*
>
> *an injunction would not be in the public interest.*

The holding of the majority below to the contrary is based, as its statement quoted at page 18 above indicates, on the words "shall be granted", in that clause of Section 205(a) which states that "upon a showing by the Administrator that such person has engaged or is about to engage in any such [illegal] acts or practices a permanent or temporary injunction, restraining

order or other order *shall be granted* without bond." The combination of the disjunctive use of "has engaged", and the phrase "shall be granted" requires, in the opinion of the majority below, that upon proof of *one* violation, no matter how far removed in time, how trivial in nature, or how innocent its cause, the court *must* issue an injunction. Stated realistically, rather than legally, the court below has held that *every* seller of goods in the United States *must* be enjoined by the courts if the Administrator chooses to demand it—for certainly every seller in the country would admit that at some time he has, probably unintentionally, violated some provision of the manifold and complex OPA regulations. The Administrator will be the last person to deny that this is the inevitable consequence.

Obviously, nothing but the clearest and most unambiguous language can warrant the conclusion that Congress intended to take this novel and far-reaching step. When the statute and the legislative history are examined, we think it quite clear that no such construction of the Emergency Price Control Act such as that given it by the majority below was intended by Congress, and certainly no such construction is so necessary that Congress can be said to have compelled it by inadvertence.

At the outset, however, we should clear away two irrelevant matters which are *not* involved here, but which are discussed at some length in the briefs for the Administrator both in the lower court and in the Memorandum on certiorari in this Court. We agree, first, that an injunction under regulatory statutes may be an appropriate remedy in certain cases where it would be inappropriate in private litigation. Congress may make it unnecessary, for example, to allege that there is

an absence of an adequate remedy at law. *Cf. Securities and Exchange Commission* v. *Jones*, 85 F. (2d) 17 (C. C. A. 2d, 1936), *certiorari denied*, 299 U. S. 581; *Henderson* v. *Burd*, 133 F. (2d) 515 (C. C. A. 2d, 1943). Congress may make it unnecessary in public litigation, to show irreparable injury. *American Fruit Growers* v. *United States*, 105 F. (2d) 722 (C. C. A. 9th, 1939); *United States* v. *Adler's Creamery*, 110 F. (2d) 482 (C. C. A. 2d, 1940), *certiorari denied*, 311 U. S. 657.

We also agree, of course, that the mere cessation of illegal acts, whether the cessation was before or after suit is not *per se* a defense, and we do not urge it as such. *Cf. Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257 (1938). The other cases cited to the same effect in the Memorandum for the Administrator (pp. 12-13) can safely be put to one side. We do *not* concede, of course, that this fact is *wholly immaterial*, nor do any of the cases cited go so far. In all such cases, as in every case in which an injunction is sought, the cessation of the wrongful acts is one factor, but only one factor, to be taken into account by the court in determining *the likelihood of future wrongful conduct*. That is precisely what the District Court has done in the case at bar.

We turn, then, to the real issue in the case: *Must* an injunction issue despite the facts found by the District Court? In the language of the majority opinion below (R. 598):

> The question remains whether the Act merely *authorized* the Court to grant an order without regard to equitable considerations, such as the Company's good intentions and the probable effect of granting an order, or whether it *required* the Court to do so.

Our answer to that question is well stated in the dissenting opinion below (R. 608):

> More than appears, I think, is necessary to justify the assumption that Congress intended to coerce judicial action and to destroy judicial discretion and hence to require an injunction to issue, even where the court finds, as it did here, that the facts are such that to do so would accomplish no other result than is already accomplished by the voluntary action of the defendant.

THE LANGUAGE OF THE STATUTE PERMITS DISCRETION

In the first place, Section 205(a) is not so categorical in its language as the Administrator, and the majority below, would imply. Several kinds of orders may be entered—"a permanent or temporary injunction, restraining order *or other order* shall be granted without bond." Taken in conjunction with the legislative history of the sections which we set out below, the inclusion of the word "or other order" was presumably to leave the courts free to enter such order, other than a temporary or permanent injunction or a restraining order, as the equities of the case might require, either by granting an injunction as to some of the acts complained of, or as to some of the defendants, or by dismissing the injunction case entirely, as was done in this case. The dissenting judge below suggests a further possibility—an order in the case "retaining it on the docket, with the right to the Administrator, on reasonable notice and a showing that violations of the Act had been resumed, to again apply to the court for injunctive relief" (R. 610).

The majority opinion below dismisses this phrase with the comment that it "evidently" means that the court may "choose between an injunction against vio-

lations of the act and an affirmative order requiring compliance" (R. 602). This is pure hypothesis. Although it is a possible construction of the phrase, it seems obvious that if Congress had intended to tie the hands of the equity courts, and, contrary to all precedent, deprive them of every vestige of discretion, it would have used language which could not have left any possible doubt as to its intention. At least, it would not have used language which can be explained away only on the basis that "evidently" it means something less than what it says.

Nor is the use of the word "shall" in the phrase "shall be granted" the categorical command which it must be if the position of the Administrator is to be sustained. "Shall", when used in a statute, ordinarily carries a mandatory connotation, it is true, but it is not necessarily the equivalent of "must", in every case. In cases such as the present one, as the dissenting judge accurately points out, where the legislative direction is addressed to a court or to a judge, the rule is just as clearly recognized that the word "shall" does *not* have a mandatory connotation, but rather is the equivalent of "may". *Becker* v. *Lebanon & M. Ry. Co.*, 188 Pa. 484, 41 Atl. 612 (1898); *In re Rutledge*, 162 N. Y. 31, 56 N. E. 511 (1900); *Clancy* v. *McElroy*, 30 Wash. 567, 70 Pac. 1095 (1902); Sutherland, *Statutory Construction* (3d ed. 1943) Sec. 5810; Crawford, *Statutory Construction* (1940) Sec. 267. The same result has been reached even where the legislative direction was in terms of "must", rather than "shall". *State* v. *District Court*, 106 Mont. 272, 76 P. (2d) 634 (1938).

The rule is peculiarly applicable to legislative directions addressed to courts of equity, or to proceedings in their nature equitable, as in the instant case. *Becker* v. *Lebanon & M. Ry. Co.*, *supra*, is an example. There a statute provided:

> "It shall be the duty of the court * * * to examine, inquire and ascertain whether such corporation does in fact possess the right or franchise to do the act from which such alleged injury to private rights, or to the rights and franchises of other corporations, results; and if such rights or franchises have not been conferred upon such corporations such courts, if exercising equitable power, *shall* by injunction, at suit of the private parties or other corporations, restrain such injurious acts." (Italics ours.)

The railroad, in excess of its rights and franchises, constructed a track in front of the plaintiff's land, and the plaintiff brought suit for an injunction under the statute. The equities were all in favor of the railroad, as the act had been unintentional and the plaintiff could have been adequately compensated at law and had been guilty of laches. The plaintiff argued, however, that under the apparently mandatory language of the statute "an injunction is no longer of grace but of right, where a corporation is acting in excess of its franchise, to the injury of a complainant."

The Court, however, affirmed an order dismissing the complaint, saying (41 Atl. at pp. 612, 613):

> "Appellant plants himself firmly on his legal right, and, if he were in a court of law, his position would be incontestable. But he has come into a court of equity, asking its aid by injunction, which is of grace, and not of right."
>
> * * * * * * * * *
>
> "It [the statute] was not intended to do away with or change the general principles on which equitable relief is administered. Notwithstanding, therefore, the use of the imperative, 'shall', the injunction is not to be granted, unless a proper case for injunction be made out, in accordance with the principles and practice of equity. The

word 'shall', when used by the legislature to a court, is usually a grant of authority, and means 'may'; and, even if it be intended to be mandatory, it must be subject to the necessary limitation that a proper case has been made out for the exercise of the power."

The cases to the same effect are legion. See, *e.g.*, *State ex rel. Nixon* v. *Grace*, 98 Ark. 505, 136 S. W. 670 (1911); *Appeal of Wentz*, 76 Conn. 405, 56 Atl. 625 (1904); *Beasley* v. *People*, 89 Ill. 571, 575 (1878); *Parkison* v. *Thompson*, 164 Ind. 609, 73 N. E. 109 (1905); *State* v. *Strait*, 94 Minn. 384, 102 N. W. 913 (1905); *Reed* v. *Wellman*, 110 Neb. 166, 193 N. W. 261 (1923); *Munro* v. *State*, 223 N. Y. 208, 119 N. E. 444 (1918); *In re Davies*, 168 N. Y. 89, 61 N. E. 118 (1901); *Jenkins* v. *Putnam*, 106 N. Y. 272, 12 N. E. 613 (1887); *People* v. *Nussbaum*, 32 Misc. 1, 66 N. Y. Supp. 129, 133 (1900); *Anderson's Appeal*, 215 Pa. 119, 122, 64 Atl. 443, 444 (1906); *Pittsburgh* v. *Coursin*, 74 Pa. 400 (1873); *In re Laub*, 21 A. (2d) 575 (Pa. Super. 1941); *Meade* v. *Meade*, 111 Va. 451 69 S. E. 330 (1910).

Certainly, therefore, the language of Section 205(a) is not the clear and convincing language which alone, we submit, would justify the drastic coercion of judicial action for which the Administrator contends. On either of the bases suggested, it is open to the interpretation for which we contend; indeed, read not as isolated words and phrases but in context, and in the light of well-settled principles of statutory construction, Section 205(a) fully supports the exercise of discretion by the District Court.

The Legislative History Indicates That Discretion Was Contemplated

But we need not dwell overlong on the language. Both the court below and the Administrator recognize that their position on the language of the section alone is in need of buttressing, and they turn to the legislative history for support. Upon examination, however, it will be seen that what legislative history there is indicates that the construction which we urge, and which was adopted by the District Court, is the one that Congress intended.

Counsel for the Administrator, and the majority below, purport to find support in the legislative history almost solely from an unexplained change by the Senate in the House bill. As passed by the House, Section 205(a) stated that "*upon a proper showing* a permanent or temporary injunction, restraining order or other order shall be granted without bond". In the Senate Committee the italicized words—"upon a proper showing"—were eliminated, and the present language was substituted—"upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices, a temporary injunction, restraining order", etc. There is no indication whatever as to why the change was made. See Sen. Rep. No. 931, 77th Cong., 2d Sess.

The language of the House bill, as the Administrator has admitted, and as the courts have frequently held,[6] left the courts as courts of equity, free to deny an injunction when it would serve no useful purpose and

---

[6] See, *e. g., Securities and Exchange Commission* v. *Lawson*, 24 F. Supp. 360 (Md. 1938); cf., *Walling* v. *T. Buettner & Co.*, 133 F. (2d) 306 (C. C. A. 7th, 1943) *certiorari denied*, 319 U. S. 771.

would be contrary to the public interest. Yet on this one change the Administrator seeks to spell out a drastic modification of the rules of equity, and the abolition of principles which have heretofore been axiomatic in injunction proceedings. Realistically, the change did no more than define the nature of the showing which the Administrator must make by repeating the prior language of the section. Yet on that alone, it is argued that Congress has executed a complete and drastic *volte face*.

Why the change was made we do not know, nor does counsel for the Administrator. It may well have been stylistic. Committee reports and debates alike are silent. We do know one thing, however, which is conclusive on this issue—*the Senate Committee did not intend to do, by the change, what the Administrator and the majority below say they did.* They did not intend to enact a drastic withdrawal of discretion from the courts. *They intended to enact the usual regulatory statute, no more and no less.*

The Report of the Senate Banking and Finance Committee, in reporting Section 205(a) *in the form in which it was enacted*, states (S. Rep. No. 931, 77th Cong., 2d Sess., p. 10):

> "(c) *Suits to enjoin violations—In common with substantially all regulatory statutes*, the bill authorizes the official charged with the duty of administering the act to apply to any appropriate court, State or Federal, for an order enjoining any person who has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of the bill. *Such courts are given jurisdiction to issue whatever order to enforce compliance is proper in the circumstances of each particular case.*" (Italics ours.)

In the light of this statement of Congressional intent, speculation about the reasons why the words "upon a proper showing" were changed is pointless. We know, definitely, that the Senate Committee did *not* intend a radical change from the House bill. We know that the Senate Committee did *not* intend to work a drastic change in equity practice. We know that the Senate Committee did *not* intend to evidence a lack of faith in the courts by coercing judicial action. What we find, on the contrary, is an intent to place Section 205(a) of this statute in the same category as "substantially all regulatory statutes". We find an intent that the court shall enter whatever order is proper "to enforce compliance"—not an order to punish. We find an intent that the court shall concern itself with "the circumstances of each particular case" so that it may find out what order is proper to protect the public *in the future* —"to enforce compliance". We find, in sum, an intent that the court shall do exactly what the District Court did in the present case.

The extent to which the holding of the majority below ignores this plain manifestation of Congressional intent is shown by a remark in the concluding paragraph of the opinion—"the limitation upon the court's discretion is unusual, * * *" (R. 604). That statement, as it describes the majority's interpretation, is true; yet it is in flat contradiction to the language of the Senate Report, *supra*, p. 29, "in common with substantially all regulatory statutes". There could be no better evidence of the extent to which the majority below have overlooked the legislative history.

The same comment may be made with respect to the reference by the majority to the remarks of the Senate Committee on the importance of price control (R. 603-604). Of course, Congress knew that there was an

emergency, and that price control was vital—and it still is. But the emphasis which it placed on the dangers of inflation serve to highlight the statement which we have quoted above *from the same report*, that the injunction features of the bill were "in common with substantially all regulatory statutes." Congress recognized the emergency, but it *did not recognize* the need which the Administrator is trying to say it did—that we must have a drastic revision of equity jurisprudence. New enforcement procedures were devised, it is true—criminal penalties, treble damage suits, even administrative licensing—but the procedure of injunctions was *not* drastically changed, it was kept like it had been in "substantially all regulatory statutes."

As an escape from this plain indication of Congressional intent the Administrator has sought to show that there are some regulatory statutes which strip the courts of all discretion, and that this merely follows in their pattern. See Memorandum on Application for Certiorari, pp. 10-11. Several statutes are supposed to be in that category—the Clayton Act,[7] the Federal Trade Commission Act,[8] the National Labor Relations Act,[9] and the Investment Acts of 1940.[10]

At the outset, it is apparent that this dichotomy, even if it did exist, would not support the Administrator's argument. The Senate Committee, which framed the final language of Section 205(a), was certainly not choosing one of two alleged types of statutes. What it *did* say was that Section 205(a) was "in common with substantially all regulatory statutes." Indeed, no-

---

[7] Act of Oct. 15, 1914, c. 323, 38 Stat. 734, 15 U. S. C. Sec. 21.

[8] Act of Sept. 26, 1914, c. 311, 38 Stat. 719, 15 U. S. C. Sec. 45.

[9] Act of July 5, 1935, c. 372, 49 Stat. 453, 29 U. S. C. Sec. 160(e).

[10] Act of Aug. 22, 1940, c. 686, 54 Stat. 842, 853, 15 U. S. C. Secs. 80a-41; 80b-9.

where in the legislative history of Section 205(a) is there any suggestion that Congress or anyone else was aware of a classification of regulatory statutes into two types. No such distinction, and obviously no such choice between types of regulatory statutes, was suggested to Congress by OPA when the Emergency Price Control Act was first proposed. The Memorandum from OPACS (predecessor to OPA) which accompanied the original bill (H. R. 5479) stated that Section 205(a) "authorizes the customary remedies by injunction." Nowhere in the House Report (H. Rep. No. 1409, 77th Cong., 2d Sess.) in the hearings or in the debates, is there even a suggestion that Congress was adopting one or the other of two distinct types of injunction provisions.

The conclusion seems to be inescapable that the Administrator is trying to create a Congressional intent out of thin air—trying to create a choice which Congress never made. Congress thought it was enacting the usual regulatory statute, and, we submit, that is what it did.

The Construction of Other Regulatory Statutes Indicates That the Court Has Discretion

The Administrator, of course, does not assert that "substantially all regulatory statutes" strip the courts of all discretion. The issue has frequently arisen under the Fair Labor Standards Act of 1938.[11] Notwithstanding consistent attempts by the Government to induce the courts to hold that they were stripped of discretion by that Act, the decisions are unanimously to the contrary. *Walling v. T. Buettner & Co.*, 133 F. (2d) 306

[11] Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C. Sec. 217.

(C. C. A. 7th, 1943), *certiorari denied*, 319 U. S. 771; *Walling* v. *Woodruff*, 49 F. Supp. 52 (M. D. Ga. 1942); *Fleming* v. *National Bank of Commerce*, 41 F. Supp. 833 (S. D. W. Va. 1941); *Fleming* v. *Phipps*, 35 F. Supp. 627 (Md. 1940); *Fleming* v. *Hoerman*, 6 Labor Cases, par. 61,283 (Kans. 1942); *Fleming* v. *Lincoln Looseleaf Warehouse Co.*, 5 Wage Hour Rep. 615 (E. D. Tenn., 1942); *Fleming* v. *Kull*, 4 Wage Hour Rep. 411 (E. D. Tex. 1941). In *Fleming* v. *Phipps*, *supra*, the Government urged the grounds of policy and necessity similar to those urged by the Administrator in the present case. Counsel stated in the *Phipps* case that an injunction should issue on the following grounds (35 F. Supp. at p. 630):

> "(1) That the failure to issue the injunction in view of the admitted violation of the Act in the past by the defendant would impliedly be a vindication of the defendant and an encouragement to others engaged in similar business activities to violate the Act; (2) because the Administrator has a limited appropriation for the enforcement of the Act and is unable to effectively 'police' the industry in which the defendant is engaged, and therefore wishes an injunction against further violation of the Act by the defendant in order that if such violations occur the defendant can be summarily disciplined on contempt charges without a jury trial; (3) that an injunction would be of assistance to the Administrator in possible future proceedings against the Long Lumber Company for alleged violation of the Act in the shipment in interstate commerce of lumber produced in violation of the terms of the Act. * * *"

The court, in denying the injunction, stated (*ibid.*):

> "The special reasons urged by counsel for the Administrator for the injunction in this case seem

to be for indirect and collateral objectives rather than in accordance with the usual equity rules relating to injunctions. *It would seem to be elementary that the purpose of an injunction is to deter rather than to punish.* Section 16(a) of the Act provides an adequate scope of punishment by the ordinary criminal procedure. Of course the provisions for injunction and for criminal prosecution are alternative remedies, but *the injunction should not be granted unless there is adequate cause shown therefor in accordance with applicable principles of equity.*" (Italics ours.)

As the Administrator conceded in his Memorandum on Certiorari (pp. 10-11) Congress also left discretion in the courts in the Sherman Act (Act of June 2, 1890, c. 647, 26 Stat. 209, 15 U. S. C. Sec. 4), the Securities Act of 1933 (Act of May 27, 1933, c. 38, 48 Stat. 86, 15 U. S. C. Sec. 77t (b)), and the Securities Exchange Act of 1934 (Act of June 6, 1934, c. 404, 48 Stat. 882, 15 U. S. C. Sec. 78aa). The list could be almost indefinitely extended. See, *e. g.*, Federal Power Act (Act of June 10, 1920, c. 285, 41 Stat. 1076, 16 U. S. C. Sec. 820); *ibid.* (Act of August 26, 1935, as amended, c. 687, 49 Stat. 861, 16 U. S. C. Sec. 825m(a)); Agricultural Association Act (Act of February 18, 1922, c. 57, 42 Stat. 388, 7 U. S. C. Sec. 292); Farmers' Cooperative Associations Act (Act of March 4, 1937, c. 508, 44 Stat. 1424, 15 U. S. C. Sec. 433); Agricultural Adjustment Act of 1933 (Act of May 9, 1933, c. 263, 48 Stat. 672, 7 U. S. C. Sec. 608a(6); Hot Oil Act (Act of February 22, 1935, c. 18, 49 Stat. 33, 15 U. S. C. Sec. 715i(a); Public Utility Holding Company Act of 1935 (Act of August 26, 1935, c. 687, 49 Stat. 831, 15 U. S. C. Sec. 79r(f); Federal Alcohol Administration Act (Act of August 29, 1935, c. 814, 49 Stat. 985, 27 U. S. C. Sec. 207); Sugar Act of 1937 (Act of September 1, 1937, c. 898, 50

Stat. 915, 7 U. S. C. Sec. 1175); Natural Gas Act (Act of June 21, 1938, c. 556, 52 Stat. 833, 15 U. S.C. Sec. 717u); Civil Aeronautics Act (Act of June 23, 1938, c. 601, 52 Stat. 1025, 49 U. S. C. Sec. 647(a)); Federal Food, Drug and Cosmetic Act (Act of June 25, 1938, c. 675, 52 Stat. 1043, 21 U. S. C. Sec. 332(a)); Alteration of Bridges Act (Act of June 21, 1940, c. 409, 54 Stat. 500, 33 U. S. C. Sec. 519); Interstate Commerce Act (Part III—Water Carriers) (Act of September 18, 1940, c. 722, 54 Stat. 946, 49 U. S. C. Sec. 916(b)); Interstate Commerce Act (Part IV—Freight Forwarders) (Act of May 16, 1942, c. 318, 56 Stat. 297, 49 U. S. C. Sec. 1017(b)).

But apart from all this, there are several other objections to this feature of the Administrator's argument. The Investment Acts of 1940, which contain language similar to that in Section 205(a) may be put to one side: there is no construction, administrative or judicial, of either act which would assist in determining what they mean. Without attempting to exhaust the subject, however, it should be pointed out that the legislative history of these acts gives no hint of any awareness by Congress that it was choosing one of two alternative forms of injunctive relief provisions. See H. Rep. No. 2639, S. Rep. No. 1775, 76th Cong., 3d Sess.

The Federal Trade Commission and National Labor Relations Board cases, however, upon which the Administrator chiefly relies, are wide of the mark, and furnish no precedent for the interpretation of Section 205(a) which the Administrator urges. The National Labor Relations Act, for example, provides in Section 10(c) that if *the Board* shall be of the opinion that any person named in the complaint—

> has engaged in or is engaging in any such unfair labor practice, then the Board * * * shall issue * * * an order requiring such person to cease and desist from such unfair labor practice * * *.

The language, plainly, refers to the Board's action, and not to the action of the courts, and it furnishes no parallel with the language of Section 205(a). Moreover, the actual practice under Section 10(c) of the National Labor Relations Act is directly contrary to that which would be required by the Administrator's construction. As the Administrator would read Section 10(c) the Board would be *forced* to issue a cease and desist order whenever it found an unfair labor practice—no matter when it happened or what the circumstances were. Patently, Congress intended no such absurd result; Congress wanted the Board to exercise its sound judgment, not to direct in advance and in all cases what that judgment *must* be. And, as one would expect, that is precisely what the Board has done. There are numerous cases in which the Board has declined, in the exercise of a sound discretion, to issue a cease and desist order where the violations of the Act have ceased under circumstances which would indicate that they would not be resumed. See, *e.g.*, *Gloray Knitting Mills*, 19 N. L. R. B. 712 (1940), *Stromberg-Carlson Telephone Mfg. Co.*, 18 N. L. R. B. 526 (1939), *Decatur Iron & Steel Co.*, 17 N. L. R. B. 1073 (1939), *Wickwire Bros.*, 16 N. L. R. B. 316 (1939), *Simplicity Pattern Co., Inc.*, 16 N. L. R. B. 294 (1939), *International Agricultural Corp.*, 16 N. L. R. B. 176 (1939), *Hope Webbing Co.*, 14 N. L. R. B. 55 (1939), *Godchaux Sugars, Inc.*, 12 N. L. R. B. 568 (1939), *Shenandoah-Dives Mining Co.*, 11 N. L. R. B. 885 (1939), *A. H. Wirz, Inc.*, 9 N. L. R. B. 480 (1938), *Talledega Cotton*

Factory, 9 N. L. R. B. 207 (1938), *Ferguson Bros. Manufacturing Co.*, 9 N. L. R. B. 189 (1938).

And the same is true of the Federal Trade Commission. Again, the "shall issue" language (15 U. S. C. Sec. 45(b)) applies to the *Commission*, not to the Courts. Again, the position of the Administrator would require that the *Commission* be stripped of all discretion, and compelled to issue a cease and desist order, whenever it found a violation, no matter when or under what circumstances it occurred. And again, the practice of the Commission is directly opposed to the Administrator's position; there are numerous decisions, see, *e.g.*, *Fels & Co.*, 34 F. T. C. D. 1536 (1942); *Golding Bros. Co., Inc.*, 33 F. T. C. D. 1631 (1941); *Clover Farm Stores Corp.*, 32 F. T. C. D. 1635 (1941); *The Texas Co.*, 25 F. T. C. D. 1509 (1937); *Sanford Hosiery Mills*, 25 F. T. C. D. 1506 (1937); *Friehofer Baking Co.*, 25 F. T. C. D. 1505 (1937); *Carl Smith, d.b.a. Fashion Silk Co.*, 25 F. T. C. D. 1503 (1937); *M. J. Levinson, d.b.a Lewis, Francine Laboratories Co.*, 25 F. T. C. D. 1499 (1937); see *Annual Report of the Federal Trade Commission* (1942), pp. 64-65. Compare, *L. B. Silver Co.* v. *Federal Trade Commission*, 292 Fed. 752 (C. C. A. 6th, 1923); *Federal Trade Commission* v. *Civil Service Training Bureau*, 79 F. (2d) 113 (C. C. A. 6th, 1935); *Butterick Co.* v. *Federal Trade Commission*, 4 F. (2d) 910 (C. C. A. 2d, 1925).

The practice under the National Labor Relations Act seems to have been recognized in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261 (1938). In that case this Court stated (303 U. S. at p. 265):

> * * * Section 10(c) directs that when the Board finds that any person has engaged in unfair labor practices it "*shall issue* * * * an order requiring

> such person to cease and desist from such unfair labor practice, *and* to take such affirmative action * * * as will effectuate the policies of this Act. * * *" Notwithstanding the mandatory form of Section 10(c), its provisions in substance leave to the Board some scope for the exercise of judgment and discretion in determining, upon the basis of the findings, whether the case is one requiring an affirmative order * * *. (Italics ours.)

The majority below (R. 599-600), relying upon the word "affirmative" in this statement, concluded that the discretion applied to only a portion of the order. Actually, the Court, while referring to Section 10(c) as mandatory in form, seems to have given recognition to the practice of the Board noted above in exercising its discretion with respect to whether any order at all was necessary. The dissenting opinion below seems much closer to the correct interpretation of the paragraph when it points out that the conjunctive connection of "cease and desist" and "affirmative action" make the words "shall issue * * * an order" equally applicable to both.

Perhaps we should repeat again that the issue under Section 205(a), in this case, is *not* whether the court *may* issue an injunction on past violations. Certainly it may, if it believes that an injunction will aid in the enforcement of the Act. By the same token, the Administrator does not prove his point by pointing out that the National Labor Relations Board and the Federal Trade Commission *may* in their discretion issue a cease and desist order on past violations (*Cf.* Memorandum on Certiorari, pp. 12-14). The real issue is whether, under those statutes the Board and the Commission *must* without any discretion issue a cease and desist order. Long and consistent administrative construction over many years shows that discretion does

exist. The same construction should apply to Section 205(a) in the present case.

Thus the conclusion must be that the other statutes upon which the Administrator relies do not help him. They do not show that "substantially all regulatory statutes" strip the courts of discretion. On the contrary, they show that similar language has been given a consistent and long-standing administrative construction which fully bears out the position which we now urge.

Decisions Under the Present Statute Support the View That the Court Has Discretion

The decisions of the lower courts under Section 205(a) are strongly inclined in favor of our construction of the section, although all of them are in the District Courts. There are a large number which hold that the Federal equity courts have discretion in spite of the fact that violations have been shown or have been admitted. *Brown* v. *Southwest Hotels, Inc.*, 50 F. Supp. 147 (E. D. Ark. 1943); *Brown* v. *Mannebach*, 1 Price Control Cases, par. 50,980 (N. D. Ill. 1943); *Henderson* v. *Sonken-Galamba Corp.*, 1 Price Control Cases, par. 50,901 (W. D. Mo. 1942); *Brown* v. *Quinlan, Inc.* (N. D. Ill.) (unreported), *reversed on other grounds and remanded*, 138 F. (2d) 288 (C. C. A. 7th, 1942); *Brown* v. *Russell Packing Co.*, 1 Price Control Cases, par. 50,979 (N. D. Ill. 1943); *Brown* v. *El Paso Iron & Metal Co.*, 1 Price Control Cases, par. 51,001 (W. D. Tex. 1943); *Brown* v. *Conner*, 1 Price Control Cases, par. 50,981 (S. D. Tex. 1943); *Brown* v. *May Hardwood Co.* (W. D. Ky.) (unreported); *Brown* v. *Regal Typewriter Co.*, 52 F. Supp. 113 (S. D. N. Y. 1943); *Brown* v. *Dweck*, 1 Price Control Cases, par. 51,006 (S. D. N.

Y. 1943); *Brown* v. *Purvin*, 1 Price Control Cases, par. 50,985 (S. D. N. Y. 1943); *Brown* v. *Standard Oil Co. of Ky.*, 1 Price Control Cases, par. 50,991 (N. D. Ala. 1943); *Brown* v. *McNeil*, 1 Price Control Cases, par. 51,815 (W. D. Wis. 1943); *Brown* v. *Douglass*, 50 F. Supp. 877 (N. D. Tex. 1943); *Brown* v. *Hannum*, 50 F. Supp. 697 (W. D. Tex. 1943). One more has a dictum to the same effect. *Henderson* v. *J. B. Beaird Corp.*, 48 F. Supp. 252 (W. D. La. 1943). One has a dictum in accord with the majority of the Court of Appeals, but the case is wholly different on the facts, since the court specifically found that the defendants there were determined not to comply unless forced to do so. *Henderson* v. *Baldwin*, 1 Price Control Cases, par. 51,711 (W. D. Pa. 1942). Only two district court decisions thus far appear to be in accord with the Court of Appeals in the present case, but in neither does the decision give enough information to show what the equities were. *Brown* v. *Society Brand Hat Co.*, 1 Price Control Cases, par. 50,965 (E. D. Mo. 1943); *Brown* v. *Osorio*, 1 Price Control Cases, par. 50,977 (D. P. R. 1943). The Administrator alleges that *Henderson* v. *C. Thomas Stores*, 48 F. Supp. 295 (Minn. 1942) is in accord with the majority below. That case, however, is wholly different. The court found "apathy and indifference" and "inexcusable carelessness". No attempt was made to correct mistakes. In such a case an injunction properly issues. There was no equity whatever on the side of the defendant.

Public Policy Supports Discretion

The Administrator has sought, throughout this case, to find support for his extreme construction of the statute on grounds of public policy. He argues that if

the Federal equity courts have no discretion in the matter of injunctions he would be aided in his enforcement program. As he states it in his Memorandum on Certiorari (p. 14), if there is no discretion in the Federal equity courts "the sanction is applied after two sets of violations, of investigations and of judicial proceedings rather than after three."

That analysis, we submit, is obviously faulty. Even the Administrator admits that if an *injunction* were violated, no punishment would be imposed by the court if the violations were not wilful. Hence, if the second investigation revealed only *innocent* violations it would not result in sanctions being applied whether there were an injunction in force or not. On the other hand, if the second investigation revealed *wilful* violations of the Act or regulations, the Administrator has sanctions immediately available in the form of criminal penalties, again whether there were an injunction in force or not. Actually, therefore, sanctions have been made available by Congress, and can be applied, after *any* investigation which discloses the necessity for a sanction—whether it be the first investigation, or the fifth. That is what we believe Congress intended—that sanctions be applied when they were necessary. We do not believe that Congress intended that an injunction should issue, as in the present case, when it is not necessary, and when its sole effect would be to damage the reputation of a reputable, long-established business which has made every effort to accomplish full compliance with the statute.

In our view, the public policy involved in this case is of quite a different character. It is one of the highest order, but it is one which condemns, not supports, the Administrator's argument.

By long tradition, equity courts have been able to render a decree consonant with all of the facts and circumstances of the case. That has been the essence of equity jurisdiction—the power to do equity. The absence of such power in courts of law was the occasion for the rise of the Chancellor's jurisdiction, and its continued absence in law cases has been the occasion for the continuance of equity jurisdiction. There should be no quarrel with the proposition which was very recently stated by this court in *Meredith* v. *City of Winter Haven* (No. 42, Oct. Term, 1943):

> An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity.

This jurisdiction, of course, stems from the Constitution, which confers on the federal courts jurisdiction over "all cases in equity arising under the laws of the United States." Article III, Section 2.

The Administrator, however, would upset this. He would, as we have pointed out above, destroy every element of discretion. He would, in effect, *coerce* the courts to decide a case in his favor and issue an injunction when he could not get it, and should not get it, on the merits of his case. In the case at bar, he insists that the District Court, which exercised its discretion, was not entitled to do so, and that it must be reversed for acting as an equity court.

There are some state decisions in which the courts have refused to construe statutes as coercing judicial action because of constitutional doubts. Compare *People ex rel. Morse* v. *Nussbaum*, 32 Misc. 1, 66 N. Y. Supp. 129 (1900); *In re Davies*, 168 N. Y. 89, 61 N. E.

118 (1901); *Parkison* v. *Thompson*, 164 Ind. 609, 73 N. E. 109 (1905). Probably a construction of Section 205(a) which would result in a Congressional attempt to coerce judicial action would not be valid under the Federal Constitution.[12] The independence of the judicial branch would be, *pro tanto*, destroyed, and destroyed in a field in which its independence has been its most basic characteristic, as the *Meredith* case, *supra*, indicates.

But whether we phrase the issue in terms of constitutional limitations or not is unimportant. What is important is that this Court is asked to approve a construction of a statute which would work a revolution in our judicial system, and which would drastically reduce the stature of the Federal Courts. Reduced to its essence, the Administrator's argument is that the statute should be construed to deprive the courts of discretion because the courts cannot be trusted to exercise discretion. Does the Administrator think that the courts are less patriotic than he; less aware of the dangers of inflation; less aware of the necessity for vigorous enforcement of price control? If he does think so, we, emphatically, do not. We believe the courts will

[12] The situation under the National Labor Relations Act, cited by the Administrator, is not at all comparable. Under that Act, and the others on which the Administrator relies, the courts have, in effect, an appellate review over a body which has *already* exercised a discretion in deciding whether a sanction is necessary at all, and, if so, in shaping it to fit the demands of the individual case. On review the courts act only when the decision of the administrative agency has been made arbitrarily or without legal warrant. In those cases, the courts are simply supplying an additional safeguard before administrative sanctions are made final. But in such cases the exercise of discretion by the administrative tribunal is surrounded with the normal safeguards—hearings, reports, exceptions, briefs, and the like. Under the Price Control Act there are no such safeguards until the case comes into the District Court.

respond to the emergency.[13] We believe that they will recognize the dangers in creeping inflation. We also believe that they will do it with regard for justice and fair dealing in the cases in which they are asked to act. That is what the District Court did in this case.

CONCLUSION

Wherefore, we submit that the decision of the Court of Appeals for the District of Columbia should be reversed, and the judgment of the District Court should be affirmed.

Respectfully submitted,

SPENCER GORDON,
CHARLES A. HORSKY,
AMY RUTH MAHIN,
Attorneys for Petitioner.

COVINGTON, BURLING, RUBLEE,
ACHESON & SHORB,
Washington, D. C.,
Of Counsel.

December, 1943.

[13] As of June, 1943, the OPA reported that it had sought injunctions in 948 cases, and that injunctions had been granted in 924 of them.

APPENDIX

STATUTE AND REGULATION INVOLVED.

Emergency Price Control Act of 1942, (Act of January 30, 1942, c. 26, 56 Stat. 23, 50 USCA App. Sec. 901).

PROHIBITIONS.

SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

ENFORCEMENT.

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

(b) Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. * * *

(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court. * * *

General Maximum Price Regulation.

(Federal Register, Thursday, April 30, 1942, 7 Fed. Reg. 3153).

Maximum Prices.

§ 1499.1 *Prohibition against dealing in commodities or services above maximum prices.* On and after the effective date of this General Maximum Price Regulation, regardless of any contract or other obligation:

(a) No *person* shall *sell* or deliver any *commodity*, and no person shall sell or supply any *service*, at a price higher than the maximum price permitted by this General Maximum Price Regulation; and

(b) No person in the course of trade or business shall buy or receive any commodity or service at a price higher than the maximum price permitted by this General Maximum Price Regulation.

§ 1499.2 *Maximum prices for commodities and services: General provisions.* Except as otherwise provided in this General Maximum Price Regulation, the *seller's* maximum price for any commodity or service shall be:

(a) *In those cases in which the seller dealt in the same or similar commodities or services during March 1942:*

The highest price charged by the seller during such month—

(1) For the same commodity or service; or

(2) If no charge was made for the same commodity or service, for the similar commodity or service, most nearly like it; or

(b) *In those cases in which the seller did not deal in the same or similar commodities or services during March 1942:*

The highest price charged during such month by the *most closely competitive seller of the same class*—

(1) For the same commodity or service; or

(2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it.

"Highest Price Charged During March 1942"

For the purposes of this General Maximum Price Regulation, the highest price charged by a seller "during March 1942" shall be:

(a) The highest price which the seller charged for a commodity *delivered* or service *supplied* by him during March 1942; or

(b) If the seller made no such delivery or supplied no such service during March 1942 his highest *offering price* for delivery or supply during that month.

No seller shall change his customary allowances, discounts or other price differentials unless such change results in a lower price. The "highest price charged" shall be a price charged during March 1942 to a *purchaser of the same class*. But if during March 1942 a seller (1) had an established practice of making allowances, discounts or price differentials to different classes of purchasers, and (2) raised his general level of prices, but thereafter during March 1942 made no delivery to any purchaser of a particular class he shall, for that particular class of purchaser calculate the highest price charged by taking the highest price charged during March 1942 to a purchaser of another class and then adjusting such price to reflect his established allowances, discounts and price differentials. No seller shall require any purchaser, and no purchaser shall be permitted, to pay a larger proportion of transportation costs incurred in the delivery or supply of any commodity or service, than the seller required purchasers of the same class to pay during March 1942 on deliveries or supplies of the same or similar types of commodities or services.

"Similar Commodities or Services"

One commodity shall be deemed "similar" to another commodity, if the first has the same use as the second, affords the purchaser fairly equivalent serviceability, and belongs to a type which would ordinarily be sold in

the same price line. In determining the similarity of such commodities, differences merely in style or design which do not substantially affect use, or serviceability, or the price line in which such commodities would ordinarily have been sold, shall not be taken into account. One service shall be deemed "similar" to another service if the first has the same use and purpose as the second and belongs to a type which would ordinarily be sold for the same or substantially the same price.

§ 1499.3 *Maximum prices for commodities which cannot be priced under § 1499.2.* The seller's maximum price for a commodity which cannot be priced under § 1499.2 of this General Maximum Price Regulation shall be a maximum price in line with the level of maximum prices established by this General Maximum Price Regulation. Such price shall be determined by the seller in accordance with the following procedures:

(a) *Sales at wholesale or retail.* In the case of a *sale at wholesale or retail,* the seller (1) shall select from the same general classification and price range as the commodity being priced under this section, the comparable commodity for which a maximum price is established under § 1499.2 of this General Maximum Price Regulation and of which the seller delivered the largest number of units during March 1942; (2) shall divide his maximum price for that commodity by his *replacement cost* of that commodity; and (3) shall multiply the percentage so obtained by the cost to him of the commodity being priced under this paragraph. The resulting figure shall be the maximum price of the commodity being priced. Within ten days after determining such maximum price under this paragraph, the seller shall report such price to the *appropriate field office of Price Administration* upon a form, duly filled

out and signed under oath of affirmation, copies from the form contained in § 1499.24, Appendix A, of this General Maximum Price Regulation. The price so reported shall be subject to adjustment at any time by the Office of Price Administration.

(b) *Sales other than at wholesale or retail.* * * *

Records

§ 1499.11 *Base-period records.* Every person selling commodities or services for which, upon sale by that person, maximum prices are established by this General Maximum Price Regulation, shall:

(a) Preserve for examination by the Office of Price Administration all his existing *records* relating to the prices which he charged for such of those commodities or services as he delivered or supplied during March 1942, and his offering prices for delivery or supply of such commodities or services during such month; and

(b) Prepare, on or before July 1, 1942, on the basis of all available information and records, and thereafter keep for examination by any person during ordinary business hours, a statement showing:

(1) The highest prices which he charged for such of those commodities or services as he delivered or supplied during March 1942 and his offering prices for delivery or supply of such commodities or services during such month, together with an appropriate description or identification of each such commodity or service; and

(2) All his customary allowances, discounts, and other price differentials.

Any person, other than a person selling at retail, who claims that substantial injury would result to him

from making such statement available to any other person, may file it with the appropriate field office of the Office of Price Administration. The information contained in such statement will not be published or disclosed unless it is determined that the withholding of such information is contrary to the purposes of this General Maximum Price Regulation.

§ 1499.12. *Current records.* Every person selling commodities or services for which, upon sale by that person, maximum prices are established by this General Maximum Price Regulation shall keep, and make available for examination by the Office of Price Administration, records of the same kind as he has customarily kept, relating to the prices which he charged for such of those commodities or services as he sold after the effective date of this General Maximum Price Regulation; and, in addition, records showing, as precisely as possible, the basis upon which he determined maximum prices for those commodities or services.

§ 1499.13. *Maximum prices of cost-of-living commodities: statement, marking or posting.* For the purposes of this section, a cost-of-living commodity is any commodity designated as such by the Price Administrator. A list of the classes of commodities so designated appears in § 1499.25, Appendix B, of this General Maximum Price Regulation.

(a) On and after May 18, 1942, every person offering to sell a cost-of-living commodity at retail shall mark the maximum price of such commodity in a manner plainly visible to, and understandable by, the purchasing public. The maximum price may be marked on the commodity itself or on the shelf, bin, rack, or other holder or container upon or in which the commodity is kept, or it may be posted at the place in the business es-

tablishment where the commodity is offered for sale. The maximum price shall be stated as follows: "Ceiling Price $.....;" or "Our Ceiling $....." Any person choosing to post by price-lines the maximum prices of commodities in the classifications marked by asterisks in § 1500.25, Appendix B, shall post the maximum price by price-line at the place in the business establishment where the commodities in such price-line are offered for sale, and, in addition, shall mark the selling price of each such commodity on the commodity itself.

(b) On or before June 1, 1942, every person offering to sell cost-of-living commodities at retail shall file with the *appropriate War Price and Rationing Board* of the Office of Price Administration a statement showing his maximum price for each such commodity, together with an appropriate description or identification of it. Such statement shall be kept up to date by such person by filing on the first day of every succeeding month a statement of his maximum price for any cost-of-living commodity newly offered for sale during the previous month, together with an appropriate description or identification of the commodity.